

104TH CONGRESS
1ST SESSION

S. 648

To clarify treatment of certain claims and defenses against an insured depository institution under receivership by the Federal Deposit Insurance Corporation, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 30 (legislative day, MARCH 27), 1995

Mr. COHEN (for himself, Mr. D'AMATO, Mr. BENNETT, and Mr. FAIRCLOTH) introduced the following bill; which was read twice and referred to the Committee on Banking, Housing, and Urban Affairs

A BILL

To clarify treatment of certain claims and defenses against an insured depository institution under receivership by the Federal Deposit Insurance Corporation, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “D’Oench Duhme Re-
5 form Act”.

6 **SEC. 2. FINDINGS AND PURPOSES.**

7 (a) FINDINGS.—The Congress finds that—

1 (1) in *D'Oench Duhme & Co. v. Federal De-*
2 posit Insurance Corporation, 315 U.S. 447 (1942),
3 the Supreme Court determined that secret side
4 agreements that were not recorded in the records of
5 an insured depository institution should not be en-
6 forceable against Federal banking agencies when
7 those agencies acquired assets following the failure
8 of the institution;

9 (2) the Supreme Court based its holding (here-
10 after in this section referred to as the “D'Oench
11 doctrine”) on its power to develop Federal common
12 law;

13 (3) in 1950, the Congress supplemented the
14 D'Oench doctrine by amending section 13(e) of the
15 Federal Deposit Insurance Act to invalidate agree-
16 ments relating to assets acquired by Federal bank-
17 ing agencies that were not recorded in official depos-
18 itory institution records;

19 (4) Federal and State courts have expanded the
20 scope of the D'Oench doctrine and section 13(e) of
21 the Federal Deposit Insurance Act by interpreting
22 them to bar tort claims based on oral representa-
23 tions, claims that do not relate to assets acquired by
24 Federal banking agencies, and numerous other

1 claims and defenses beyond the original scope and
2 intent of those two lines of authority;

3 (5) the Federal banking agencies' aggressive
4 use of the D'Oench doctrine and section 13(e) of the
5 Federal Deposit Insurance Act in the administrative
6 claims process and litigation, combined with the ex-
7 pensive interpretation of those authorities by the Su-
8 preme Court, have led to fundamentally unfair re-
9 sults; and

10 (6) many individuals have been barred from as-
11serting potentially valid claims and defenses once an
12 insured depository institution has been declared in-
13 solvent and taken over by a Federal banking agency.

14 (b) PURPOSES.—The purposes of this Act are—

15 (1) to unify the lines of authority developed
16 under the Federal common law and referred to in
17 subsection (a) and section 13(e) of the Federal De-
18 posit Insurance Act, so that all cases relating to
19 agreements against the interest of the Federal De-
20 posit Insurance Corporation are decided pursuant to
21 Federal statutory law; and

22 (2) to return the D'Oench doctrine to its origi-
23 nal purpose by continuing to bar the enforcement of
24 unrecorded agreements, but allowing certain poten-

1 tially valid intentional tort and other claims and de-
2 fenses to be adjudicated on their merits.

3 **SEC. 3. CLARIFICATION.**

4 Section 13(e) of the Federal Deposit Insurance Act
5 (12 U.S.C. 1823(e)) is amended to read as follows:

6 “(e) AGREEMENTS AGAINST INTERESTS OF THE
7 CORPORATION.—

8 “(1) IN GENERAL.—No agreement which tends
9 to diminish or defeat the interest of the Corporation
10 in any asset acquired by the Corporation under this
11 section or under section 11, by purchase or assump-
12 tion, or in its capacity as receiver of any insured de-
13 pository institution, shall be enforceable against the
14 Corporation unless that agreement is in writing and
15 was executed in the ordinary course of business by
16 an insured depository institution through an officer
17 or other employee or representative of the institution
18 having the authority to execute such an agreement
19 on behalf of the institution.

20 “(2) CLAIMS AGAINST THE CORPORATION.—
21 Notwithstanding paragraph (1), no court may bar,
22 estop, or otherwise prohibit the adjudication against
23 the Corporation, in its corporate capacity and as re-
24 ceiver of an insured depository institution, of—

1 “(A) a claim or defense that does not re-
2 late to specific assets acquired by the Corpora-
3 tion;

4 “(B) a claim or defense that does relate to
5 transactions that would not, in the normal
6 course of business, be reflected in the trans-
7 action records of the institution;

8 “(C) a claim or defense in litigation com-
9 menced before the date of the appointment of
10 the Corporation as receiver or conservator for
11 the insured depository institution;

12 “(D) a claim or defense, filed at any time,
13 based on alleged intentional torts or alleged vio-
14 lation of State or Federal law, if—

15 “(i) the party asserting the claim or
16 defense demonstrates that the party did
17 not—

18 “(I) participate in a scheme to
19 defraud the subject insured depository
20 institution; or

21 “(II) knowingly lend itself to a
22 scheme to mislead bank examiners by
23 misrepresenting the value of the as-
24 sets of the institution; and

1 “(ii) any oral representations relied
2 upon are not in conflict with a written
3 agreement contained in the records of the
4 institution.

5 “(3) STATUS AS HOLDER IN DUE COURSE.—Ex-
6 cept as otherwise provided in paragraph (1), any
7 other provision of Federal statutory law, or applica-
8 ble State law, the Corporation may not defeat a
9 claim related to an asset by demonstrating that the
10 asset was acquired in good faith, for value, and
11 without actual knowledge of the claim, unless the
12 Corporation also demonstrates that the asset was
13 not acquired by the Corporation upon its appoint-
14 ment as conservator or receiver or as part of a pur-
15 chase and assumption transaction.

16 “(4) EXCEPTION FOR VENDOR AGREEMENTS.—
17 Subsection (e)(1) does not apply to an agreement for
18 the sale or purchase of goods or services actually re-
19 ceived by or delivered to an insured depository insti-
20 tution before the date of appointment of a receiver
21 for that institution.”.

22 **SEC. 4. REPEAL.**

23 Section 11(d) of the Federal Deposit Insurance Act
24 (12 U.S.C. 1821(d)) is amended—

25 (1) by striking paragraph (9); and

1 (2) by redesignating paragraphs (10) through
2 (19) as paragraphs (9) through (18), respectively.

3 **SEC. 5. CONFORMING AMENDMENTS.**

4 Section 11 of the Federal Deposit Insurance Act (12
5 U.S.C. 1821) is amended—

6 (1) in subsection (e)—

7 (A) in paragraph (8)(A), by striking “sub-
8 section (d)(9) of this section and”;

9 (B) in paragraph (8)(B), by striking
10 “(12)” and inserting “(11)”; and

11 (C) in paragraph (8)(E), by striking “sub-
12 section (d)(9) of this section,”; and

13 (2) in subsection (g)(4), by striking “(d)(11)”
14 and inserting “(d)(10)”.

15 **SEC. 6. APPLICABILITY.**

16 Section 13(e) of the Federal Deposit Insurance Act,
17 as amended by this Act, shall apply to administrative
18 claims brought or pending, and any litigation filed, in
19 progress, or on appeal, on or after October 19, 1993.

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